IN THE SUPREME COURT OF FLORIDA

ALLSTATE INSURANCE COMPANY,
a foreign insurance company,

Petitioner/Cross-Respondent,

vs.

JULIAN MARTINEZ,

Respondent/Cross-Petitioner.

CASE NO. SC01-1622

Third District
CASE NO. 3D00-2464

INITIAL BRIEF OF PETITIONER/CROSS-RESPONDENT

Christopher J. Lynch
ANGONES, HUNTER, McCLURE
LYNCH, WILLIAMS & GARCIA, P.A.
Attorneys for Appellant
66 West Flagler Street
9th Floor, Concord Building
Miami, Florida 33130
Telephone (305) 371-5000

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

INTRODUCTION

This is an appeal from a final judgment rendered pursuant to an arbitration award in favor of the Respondent/Cross-Petitioner, JULIAN MARTINEZ ("MARTINEZ"), and against Petitioner/Cross-Respondent, ALLSTATE INSURANCE COMPANY ("ALLSTATE"). This Initial Brief is submitted on behalf of ALLSTATE. References to the Record On Appeal will be by the symbol "R" and references to the Appendix to this brief will be by the symbol "App."

STATEMENT OF THE CASE AND FACTS

The relevant facts are outlined in the Third District's opinion, ***Allstate Insurance Company v. Martinez,*** 26 Fla. L. Weekly D 1681 (Fla. 3rd DCA July 11, 2001), (Appendix A), and they are as follows. In May of 1997, MARTINEZ submitted a "supplemental" claim, under his homeowners policy with ALLSTATE, seeking recovery for damages allegedly incurred to his home as a result of Hurricane Andrew. MARTINEZ later filed a petition to compel appraisal, as well as a petition seeking a declaratory decree ordering ALLSTATE to appraisal. (R. 2-12).

The ALLSTATE policy contained the following appraisal/arbitration provision:

> **Appraisal.** If you and we fail to agree on the amount of loss, either party may make written demand for an appraisal. Upon such demand each party must select a competent and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days, you or we can ask a judge or a court of record in the state were the residence premises is located to select an umpire.

> The appraisers shall then determine the amount of loss, stating separately the actual cash value and the amount of loss to each item. If the appraisers submit a written report of an agreement to us, the amount agreed upon shall be the amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by any two will determine the amount of loss.

ALLSTATE responded to MARTINEZ's petition by denying that the damage which served as the basis of the supplemental claim was covered under the ALLSTATE policy, and by contending that the amounts originally paid to MARTINEZ, shortly after Andrew, fully reimbursed MARTINEZ for his hurricane damage. (R. 13-24). ALLSTATE further contended that appraisal of the alleged loss was premature, since MARTINEZ had failed to comply with terms of the policy which required MARTINEZ to file a proof loss and submit to an examination under oath. (R. 74-94).

On November 18, 1997, the trial court entered an order which, in effect, agreed with ALLSTATE's position that appraisal was premature. The court indicated that MARTINEZ could petition the Court to compel appraisal after he had complied with the policy conditions of submitting to an examination under oath, production of documents which reasonably related to the claim, and inspection of the property. (R. 118).

Ultimately, the court determined that MARTINEZ had complied with the policy conditions and the appraisal process proceeded. (R. 145-146). Over ALLSTATE's objection, the court also held that the appraisal process would not be governed by the

Florida Arbitration Code, §682.01 et. seq., Fla. Stat. The court expressly indicated that ALLSTATE:

> Is precluded from having a court reporter present in order to create a record of the proceedings, and also, over defendant's objections, that attorneys are precluded from participating in the appraisal hearing. If defense counsel elects to attend the appraisal hearing, she is directed to be an "absolutely silent presence."

(R. 145-146; 151-152).

As a result, the appraisal/arbitration hearing was no hearing at all, and it simply amounted to the neutral umpire and the parties' respective arbitrators, discussing the issues off the record, and ultimately rendering an award in favor of MARTINEZ in the amount of $18,782.44. On April 27, 2000, MARTINEZ moved to confirm the appraisal award. (R. 153-156). ALLSTATE then moved to vacate the award on the basis, amongst other grounds, that the appraisal/arbitration had been conducted contrary to the provisions of the **Arbitration Code**. (R. 157-160).

The trial court ultimately denied ALLSTATE's motion to vacate. (R. 183). The court then affirmed the arbitration award and entered final judgment in favor of MARTINEZ for the amount of the award. (R. 172-175; 262). The court also awarded costs, and prejudgment interest in amounts disputed by ALLSTATE. (R. 269-275; 287-288).

On appeal, the Third District affirmed the appraisal award and judgment, finding that the trial court was correct in determining the appraisal process was not governed by the **Florida Arbitration Code** since:

> [A]ppraisal and arbitration are not identical processes. Appraisers are expected to act on their expertise. They need to meet only to iron out any differences in their opinions. . .

Allstate Insurance Company v. Martinez, (App. A. pg. 3).

In so ruling, the court cited with favor its earlier decisions in ***Allstate Insurance Co. v. Suarez***, 26 Fla. L. Weekly D. 1412 (Fla. 3rd DCA June 6, 2001) and ***Liberty Mutual Fire Ins. Co. v. Hernandez***, 735 So.2d 587 (Fla. 3rd DCA 1997). The panel of the Third District which decided ***Allstate Ins. Co. v. Suarez***, quoted the court's earlier decision in ***Liberty Mutual Fire Ins. Co. v. Hernandez***, for the following principle:

> Although appraisal clauses are treated as arbitration clauses for most purposes, the two processes are not identical. "[A]ppraisers are generally expected to act on their own skill and knowledge; they may reach individual conclusions and are required to meet only for the purpose of ironing out differences in the conclusions reached[.]"
>
> The appraisal clause in this case provides that "[t]he appraisers will separately set the amount of loss. If the appraisers submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire." . . . Whether the party-appointed appraisers visit the premises together or separately, the clause contemplates inspection and evaluation by each appraiser individually, not a trial - type hearing.

Further, in finding the **Arbitration Code** inapplicable, the ***Martinez*** court, like the ***Suarez*** court, noted and certified conflict with ***Hoenstine v. State Farm Fire & Casualty Co.***, 736 So.2d 761 (Fla. 5th DCA 1991); and ***Florida Farm Bureau***

Casualty Ins. Co. v. Sheaffer, 687 So.2d 1331 (Fla. 1st DCA 1997).[1] In ***Hoenstine*** and ***Florida Farm Bureau***, the Fifth and First Districts respectively, interpreted identical appraisal clauses as binding arbitration agreements governed by the procedures set forth in the **Arbitration Code**.

Following the Third District's ruling, ALLSTATE invoked the discretionary jurisdiction of this Court, and on August 3, 2001, the Court entered an order postponing its decision on jurisdiction and setting forth a briefing schedule.[2] ALLSTATE's Initial Brief now follows.

---

[1] ALLSTATE has also invoked the discretionary jurisdiction of this Court in the ***Allstate Ins. Co. v. Suarez*** case, Supreme Court case number SC01-1459. The issue regarding the applicability of the **Arbitration Code** raised herein is the identical issued raised in ***Allstate v. Suarez***.

[2] MARTINEZ has filed a cross-notice to invoke the discretionary jurisdiction of this Court. MARTINEZ has indicated in the cross-notice, that the decision of the Third District expressly and directly conflicts with this Court's decision in ***Argonaut Insurance Co. v. May Plumbing Co.***, 474 So.2d 212 (Fla. 1985), on the issue of prejudgment interest.

SUMMARY OF THE ARGUMENT

The trial court erred in failing to vacate the arbitration award since the appraisal/arbitration hearing was conducted in a manner that substantially prejudiced the rights of ALLSTATE. ALLSTATE was deprived of its rights under **§682.06(2)** of the **Arbitration Code,** since ALLSTATE was denied the opportunity to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing. As such, **§682.13(1)(d)** of the **Code**, which indicates that the court shall vacate an award when the hearing is conducted contrary to the provisions of **§682.06**, was applicable, and the award should have been vacated.

The Third District's decision, that in the context of this dispute, the policy provision called for appraisal, or a simple resolution of a dispute as to the amount of loss, ignores this Court's decision in ***State Farm Fire & Casualty Co. v. Licea***, 685 So.2d 1285 (Fla. 1996). As ***Licea*** indicates, under the circumstances posed by an alleged hurricane loss, the appraisers/arbitrators determine not only the amount of loss, but whether the loss was caused by a covered peril or a cause not covered.

There is no realistic way that appraisers/arbitrators can determine causation without the parties having the traditional rights to present evidence, examine and cross - examine witnesses. Only in this manner will similar claims submitted under similar appraisal/arbitration provisions be resolved on their merits. This Court should therefore quash the Third District's ruling and approve ***Hoenstine v. State Farm Fire & Casualty Co***. and ***Florida Farm Bureau Ins. Co. v. Sheaffer***. The case should

then be remanded with directions to the trial court that the judgment be vacated, and that the appraisal/arbitration be conducted in conformity with the **Arbitration Code**.

STANDARD OF REVIEW

The standard of review of the trial court's ruling that the **Arbitration Code** does not apply - a pure issue of law - is *de novo*. ***Walter v. Walter***, 464 So.2d 538 (Fla. 1985); ***Cassoutt v. Cessna Aircraft Co.***, 742 So.2d 493 (1st DCA 1999).

Further, as ***Schnurmacher Holding, Inc. v. Noriega***, 542 So.2d 1327 (Fla. 1989) indicates, if the Court determines that the **Arbitration Code** is applicable, it may vacate the arbitration award if it determines the following provision of **§682.13 Fla. Stat**. has been violated:

> **Section 682.13 Vacating an Award**. -
>
> (1) Upon application of a party, the court shall vacate an award when . . .
>
> (d) The arbitrators or the umpire in the course of her or his jurisdiction refused to postpone the hearing upon sufficient cause being shown therefore or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.[3]

---

[3] **Section 682.06 Fla. Stat**., indicates, in relevant part, as follows:

682.06 Hearing. - Unless otherwise provided by the agreement or provision for arbitration. . .

(2) The parties are entitled to be heard, to present evidence material to the controversy and to cross - examine witnesses appearing at the hearing.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO VACATE THE APPRAISAL/ARBITRATION AWARD SINCE THE APPRAISAL/ARBITRATION WAS CONDUCTED IN A MANNER CONTRARY TO THE PROVISIONS OF THE FLORIDA ARBITRATION CODE AND WITH THE RESULT THAT ALLSTATE'S RIGHTS WERE SUBSTANTIALLY PREJUDICED

The traditional distinctions between arbitration and appraisal, relied upon by the Third District in ***Liberty Mutual Fire Ins. Co. v. Hernandez***, and in deciding ***Suarez*** and ***Martinez***, are further outlined by the Second District in ***Preferred Ins. Co. v. Richard Parks Trucking Co.,*** 158 So.2d 817, 820-21 (Fla. 2nd DCA 1963), a decision which was cited by the ***Hernandez*** court. The ***Preferred Insurance*** court indicated that:

> The distinctions between arbitration and appraisement are noted in 5 Am. Jur.2d. Arbitration and Award, §3, p.520:
>
> §3. Distinctions - appraisement.
>
> Although, because certain of the rules of law that apply to arbitration also apply to appraisement, the two are often confused, arbitration and appraisement are not the same. Indeed, arbitration should not be confused with what takes place in any case were parties refer to selected persons some ministerial trial duty or some matter involving only the ascertainment of facts, requiring neither hearing nor exercise of judicial discretion.
>
> An agreement for arbitration ordinarily encompasses the disposition of the entire controversy between the parties upon which an award or judgment may be entered, whereas an agreement for appraisal extends merely to the resolution of the specific issues of actual cash value and the amount of loss, all other issues being reserved for determination in a plenary action before the court. Furthermore, appraisers

> are generally expected to act on their own skill and knowledge; they may reach individual conclusions and are required to meet only for the purpose of ironing out differences in the conclusions reached; and they are not obligated to give the rival claimants any formal notice or to hear evidence, but may proceed by ex-parte investigation so long as the parties are given the opportunity to make statements and explanations with regard to matters in issue. Arbitrators, on the other hand, must meet together at all hearings; they act quasi-judicially and may receive the evidence or views of a party to the dispute only in the presence, or a notice to, the other side, and may adjudge the matters to be decided only on what is presented to them in the course of an adversary proceeding.
>
> Whether the procedures required are those of an arbitration or of an appraisal is to be found from the intent of the disputants or from the character of the questions and issues to be answered, or both. However, where the agreement so contemplates, the results of an appraisal may be just as binding as the award of arbitrators. (emphasis supplied).

ALLSTATE submits that the Third District's conclusion that the appraisal process should be conducted informally, ignores the character of the "questions and issues to be answered" when the appraisal clause has been invoked. In ***State Farm Fire & Casualty Co. v. Licea***, ***supra*** at 1288, this Court, interpreting an identical clause in a policy also covering a home damaged by Hurricane Andrew, indicated that the appraisers'/arbitrators' task was as follows:

> We interpret the appraisal clause to require an assessment of the amount of loss. This necessarily includes determination as to the costs of repair or replacement, and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dry rot or various other

designated, excluded causes.[4] (Emphasis Supplied).

In persuading the Third District that the appraisal/arbitration should be an informal process, MARTINEZ contended that the appraisers/arbitrators had the requisite experience and knowledge to resolve the claim, and that accordingly, there was no need for evidence or testimony. In light of this argument, it is important to view the legal issue on appeal as presented in the factual context of this case.

This is not a case, for example, where two appraisers who have expertise in appraising damage to an automobile, disagree as to the extent of damage to an automobile's fender and the amount necessary to replace or repair that damage. ALLSTATE paid the initial claim submitted by its insured in the months following Hurricane Andrew. More than five years later, MARTINEZ made a supplemental claim for damages, and invoked the appraisal/arbitration clause.

Once the supplemental proof of loss was filed, and the parties failed to agree, the appraisal/arbitration process proceeded. ALLSTATE defended the claim on the basis that the damage outlined in the supplemental proof of loss was not caused by Hurricane Andrew. Under this Court's decision in ***Licea***, however, appraisal/arbitration of the causation issue was called for.

---

[4] The determination by this Court in ***Licea***, that the appraisers/arbitrators are to determine causation in addition to the amount of loss, appears to conflict with this Court's earlier opinion in ***New Amsterdam Casualty Co. v. J.H. Blackshear, Inc.***, 116 Fla. 289, 156 So. 695 (Fla. 1934). In the latter case, the Court indicated that the object of the appraisal clause "[I]s merely to fix the amount of recoverable damage." *Id.* at 696.

ALLSTATE submits that there is no realistic way that even the most experienced appraiser or umpire could determine causation absent the presentation of evidence, testimony and cross - examination. As this Court has interpreted the appraisal/arbitration provisions in ***Licea,*** there must be a determination of whether or not the requirement for a repair or replacement was caused by a covered peril - Hurricane Andrew, a cause not covered - such as wear and tear, or indeed, whether the damage occured at all.

Without question, the resolution of this issue will in large part turn on evidence elicited from the insured, who would be the only individual who could shed any light on the extent of the damage incurred as a result of the storm. In most circumstances, an appraiser or umpire would have no basis for a viable opinion on the causation issue.

For this reason, ALLSTATE believes, as the majority of Florida courts to date have recognized, that the formal procedures outlined in the **Florida Arbitration Code** should govern the appraisal/arbitration provision in question. As such, ALLSTATE submits that Florida courts have recognized that the parties must be afforded a reasonable opportunity to be heard and present evidence on this issue. This right to present evidence and call witnesses is, perhaps, the most important due process right of a litigant, and the exclusion of the testimony of a witness is a drastic remedy which should be invoked only under the most compelling circumstances. ***Delgado v. Allstate Ins. Co.***, 731 So.2d 11, 14 (Fla. 4th DCA 1999), citing ***Fogel v. Mirmelli***, 413 So.2d 1204 (Fla. 3rd DCA 1982); and ***Lobue v. Travelers Ins. Co.***, 388 So.2d

1349 (Fla. 4th DCA 1980).

In the present action, the due process rights of ALLSTATE, as these rights are codified in the **Florida Arbitration Code**, have been violated. Specifically, **§682.06** of the Code, provides, in subsection (2), that the parties are entitled to be heard, to present evidence material to the controversy and cross-examine witnesses appearing at the hearing.

In sum, ALLSTATE submits that the Third District's reasoning that appraisal in this context is an informal process which concerns the amount of loss only, ignores this Court's decision in ***State Farm v. Licea***. ALLSTATE further submits that in light of ***State Farm v. Licea***, which calls for the appraisal/arbitration panel to determine causation and the amount of loss, the Court must find that the **Arbitration Code** is applicable.[5] Only through the procedures outlined in the Code will the appraisals/arbitrators will be in a position to make an informed and fair decision based on the merits of the particular claim. A contrary holding would ignore the reality of the

---

5 The issue of whether appraisers/arbitrators determine causation in addition to the amount of loss, is once again before this Court in ***Nationwide Mutual Ins. Co. v. Johnson***, 774 So.2d 779 (Fla. 2nd DCA 2000), Supreme Court case number SC-019, and ***Gonzalez v. State Farm Fire & Casualty Co.***, 25 Fla. L. Weekly. D 2614, - So.2d - , 2000 WL 1671415 (Fla. 3rd DCA 2000), Supreme Court case number SC-01321. In deciding the aforementioned cases, the District Courts referred to ***Opar v. Allstate Ins. Co.***, 751 So.2d 758 (Fla. 1st DCA 2000), rev. den. 767 So.2d 459 (Fla. 2000) in which the First District indicated that the only issue to be resolved by the appraisal process is the amount of loss and not causation. ALLSTATE submits that unless this Court, in deciding ***Johnson*** and ***Gonzalez,*** agrees with the scope of appraisal/arbitration as determined by the ***Opar*** court, it should find that the **Arbitration Code** provisions are applicable to appraisal/arbitration pursuant to similar policy provisions.

process as dictated by this Court, would significantly prejudice a party's right to present his position regarding the claim and would result in an uninformed decision by the appraiser/arbitrator.

For these reasons, **§682.13(1)(d)** of the **Arbitration Code** warrants reversal. As this provision indicates, the trial court should have vacated the arbitration award since ALLSTATE clearly demonstrated that the arbitrators refused to hear evidence material to the controversy and otherwise conducted the hearing contrary to provisions of **§682.06(2)**. ALLSTATE's rights were undoubtedly prejudiced, and the lower court's ruling denying the motion to vacate should be reversed.

CONCLUSION

As set forth above, the Court should quash the Third District's opinion and approve ***Hoenstine v. State Farm Fire & Casualty Co.***, and ***Florida Farm Bureau Casualty Ins. Co. v. Sheaffer***. The case should then be remanded to the trial court with directions that the final judgment be vacated and the appraisal/arbitration should be conducted in accordance with the **Florida Arbitration Code**.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed this 28th day of August, 2001 to: **Lauri Waldman Ross, Esq.**, Two Datran Center, Suite 1705, 9130 S. Dadeland Blvd., Miami, FL 33156.

Respectfully submitted,

ANGONES, HUNTER, McCLURE,
LYNCH ,WILLIAMS & GARCIA, P.A.
66 West Flagler Street - Ninth Floor
Miami, Florida 33130
(305) 371-5000

BY: _____
CHRISTOPHER J. LYNCH
FBN. 331041

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief of Petitioner/Cross-Respondent was prepared in 14-point Time New Roman font.

BY:_____
CHRISTOPHER J. LYNCH

APPENDIX

TAB